Supreme Court, U.S.
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No. 99-1203

IN THE
SUPREME COURT OF THE UNITED STATES

Dennis Theriot, et al.,
Petitioners,

v.

Parish of Jefferson, State of Louisiana, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

MAY IT PLEASE THE COURT:

The briefs of Jefferson Parish[1] and the DOJ[2] contain some of the same clear errors made by the courts below. This reply will treat such few of the more important errors as the page limitations permit.

1. The Initial Racial Motivation.

Racial considerations, with the DOJ's Section 5 preclearance demands as their source, provided the predominant motivation from the very onset of the design of the current District 3. When the DOJ insisted, under threat of denial of preclearance and delay of the scheduled elections, upon a non-retrogression "benchmark" of an enhanced black-majority BVAP,[3] it provided a purely racial motivation: that

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[1] To minimize repetition, this brief incorporates by reference the statement of the case contained in the Petition for Writ of Certiorari (*q.v.*, please), and will use many of the same abbreviations and identifications of parties, proceedings, and terminology utilized in that document.

[2] The briefs of the Parish and the DOJ will sometimes hereinafter be referred to, together, as "the opposition."

[3] Due to space limitations, petitioners will refer to those record citations made in the footnotes of their original Petition for Writ of Certiorari. For this footnote, please see record citations of footnote 9, pp. 12-13, footnote 4, p. 10 (where the Parish attorney M. Nan Alessandra is informed by the DOJ that a minimum of 52.3% BVAP will be required in the post-1990 Census-adjusted District 3 in order to achieve Section 5 preclearance); footnote 8, pp. 12-13 (where the Parish is advised by its attorney M. Nan Alessandra that a 53% BVAP, and not 52.3%, is the actual figure that it should adopt to avoid Section 5 liability); by footnotes 36, 37 and 39, all p. 22 (Lawson uses the 55% BVAP as a minimum in the current District 3 in order to enlist the *EJC* plaintiffs' support of his plan as settlement of the *EJC* litigation); and finally footnote 38, p. 22 (testimony that Lawson

purely race-based demand was the only reason that the current District 3 became a radical departure from the March 1990 plan, rather than the mere "ministerial" modification that the *EJC*[4] trial judge and all of the *EJC* case parties expected to perform after release of the 1990 Census. In capitulating to the DOJ's racial demand, the Parish adopted the DOJ's racial demand as its own predominating racial motivation. Meeting this racial benchmark – irrespective of its legality – "trumped" all of the other motivations with respect to the wholesale alteration of District 3's boundaries pursuant to the 1990 Census. While there are jurisdictions in which a 55% or 57% BVAP majority district which would be geographically compact as required by this Court in *Thornburg v. Gingles*, 478 U.S. 70, 50 (1986), this was and is not the case in Jefferson Parish upon the release of the 1990 Census, given the Parish's relatively small black population and that population's dispersal. The *Theriot* Fifth Circuit's August 8, 1991 *per curiam* which struck down the Special Master's Plan because it lacked a majority BVAP was done so in legal error, as Section 2 does not always guarantee a black majority remedy – but instead, a reasonable remedy to vote dilution particular to the jurisdiction. That the Parish then did not chose to appeal this erroneous conclusion does not make it any less violative of the *Gingles* requirements or the protection offered to voters under the Equal Protection Clause.

The parallels of the instant case with *Miller v. Johnson*, 515 U.S. 900 (1995) ("*Miller*") are instructive. Of course, a number of distinctions exist, but those distinctions are not

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actually (wrongly) believed that 55% BVAP was the minimum required to achieve Section 5 preclearance).

[4] Please see citations of the *East Jefferson Coalition v. The Parish of Jefferson* cases made in footnote 1, p. 1 of Petition for Writ of Certiorari.

meaningful here. Here, the DOJ set its retrogression benchmark higher than what would be required by the *Beer v. United States*[5] line of cases (see argument below) in order to require Jefferson Parish to increase, unnecessarily, the percentage of BVAP in a single district; in *Miller*, the DOJ's "max-black" demand was that Georgia increase two black-majority districts to three. Just as in *Miller*, capitulation by the legislative body to the DOJ's racial demands in the instant case constituted adoption of a predominating racial motivation. *See*, 515 U.S. at 917-918. Evidence that the DOJ was operating as a partisan on the side of the *EJC* plaintiffs, and was in effect "strong-arming" Jefferson Parish into the gerrymander, is supplied by the transcript of the Rule 11 hearing testimony of the Parish's Attorney, M. Nan Alessandra, and the affidavit submitted by her in connection therewith (App. K and 4, passim). Ms. Alessandra's 1991 admissions against respondents' 1997 "political" interests are buttressed by the Parish's written submissions of the current plan for approval to the DOJ,[6] and by the letter written to John Tanner of the DOJ by the *EJC* plaintiffs' attorney, M. David Gelfand (the 52.3% BVAP benchmark "was a critical 'ground rule'" in the *EJC* plaintiffs' successful attempt to have the parish draw an enhanced black majority district).[7] Another interesting parallel: In *Miller*, the DOJ's Voting Section of the Civil Rights Division was pushing its "max-black" agenda in late 1991 and early 1992; somewhat contemporaneously, in the spring of 1991, the same Voting Section was making its BVAP percentage increase demands on Jefferson Parish. In *Miller*, it took two denials of

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[5] 425 U.S. 130 (1976).

[6] Please see the record citations made in Petition for Writ of Certiorari footnote 4, p. 10, and footnote 13, p. 15.

[7] See A100.

preclearance to force the legislative body to adopt the racial agenda; here, the mere threat of preclearance denial was sufficient to cause the Parish to adopt the DOJ's predominant racial motivation and to violate its traditional districting principles in order to augment the District 3 BVAP. The DOJ asserts that it does not require jurisdictions to engage in unconstitutional racial gerrymandering (DOJ brief, p. 20). That definitely was not true of the DOJ in 1991-92, as found by this Court in *Miller v. Johnson, supra*. The DOJ did so in the instant case; this Court can send a salutary message, that the DOJ should not resume that practice, after granting certiorari herein.

It was clear error for the courts below to fail to find that, but for the DOJ's racial demands, the Parish would not have undertaken the post-1990 Census radical restructuring of District 3, and of necessity, District 2, by the adoption of a plan which for the very first time eviscerated the Parish's traditional districting principles. It stands to reason that, if a governing body would not have taken a certain action but for a certain initial motivation (*i.e.*, the mandate of an enhanced black majority in District 3), that motivation must be considered to predominate over any other subsequent motivations that might later come into play. Since that conclusion derives solely from reason, to fail to reach it might fairly be said be as much an error of law as an error of fact.

The deference to local courts in voting district cases, mentioned in *White v. Regester*, 412 U.S. 755 (1973), should be tempered here in light of the *Theriot* trial judge having been a relatively recent appointee with no known previous experience in voting cases, and also by the new Equal Protection issues have since arisen in the context of election districting litigation.

2. The Retrogression Issue: Properly Raised and Correctly Argued.

The DOJ brief attacks a "straw man" in claiming that petitioners raised the retrogression issue with respect to "narrow tailoring"; petitioners at all times have attacked the DOJ's position on retrogression as an improperly-predominant racial motivation. The DOJ and the Parish also contradict each other: the DOJ's brief (p. 17) says the court of appeals "correctly concluded" that 52.3% BVAP was the proper Section 5 benchmark; the Parish brief claims the 52.3% BVAP minimum was "justified," but " not required" (p. 23), and "was not resolved" (p. 12) by either of the lower courts, and therefore is an issue not properly raised here. To the contrary, petitioners raised this retrogression issue in both courts below, and properly bring it before this Court in light the lower courts' actual rulings on this issue – rulings made in clear error.[8]

For petitioners to succeed, of course, we must prove that racial motivations predominated. As demonstrated above, the DOJ's retrogression position provided that improperly predominant racial motivation. And the DOJ position was legally erroneous. Contrary to the DOJ brief, p. 17, the March 1990 plan was not "valid and in effect when the 1990 Census figures were released." Both opposition briefs fail to

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[8] The Fifth Circuit considered the issue, and faced with the post-1990 Census BVAP increase in District 3's then under-populated boundaries, concluded in its published opinion "A majority-minority district which fell below the documented increase in the BVAP would have been subject to a Section 2 challenge." (See A25). It is true that the trial court used the word "justified" in ruling on the issue: "Because of the increase in black population in District 3 under the findings of the 1990 Census, Jefferson Parish was justified in using 52.3% BVAP as the benchmark to determine retrogression under Section 5." (See A58). Amazingly, the appellate court treated what is clearly a conclusion of law – "justified" here clearly means was legally valid – as a finding of fact.

note that the Parish always went to great pains during the *EJC* litigation to point out that all of the plans confected by the Council in 1989 and 1990 were only adopted conditionally, and "under protest." The Parish maintained throughout that litigation, until the Fifth Circuit issued its March 1991 decision holding otherwise, that the 4-2-1 plan did not violate VRA Section 2. Accordingly, the March 1990 plan did not become "in effect" – the suspensive condition did not occur – until the Fifth Circuit's mandate issued and became final. By that time, the 1990 Census showed the plan was invalid under the one-person/one-vote rule. The March 1990 plan thus cannot provide the benchmark. Instead, the 4-2-1 plan, that had been ordered into effect by an earlier judgment of the Eastern District of Louisiana,[9] was valid and in effect until that plan was struck down by the Fifth Circuit's March 1991 final judgment. Compare *Young v. Fordice*, 520 U.S. 273, 282-283 (1997): a plan [*e.g.*, the *EJC* case 4-2-1 plan] can be in force and effect for many years even though it violated some provision of state law, while a short-lived plan abandoned before any elections were held under it was not "in force and effect." Accordingly, the proper Section 5 benchmark was the 24% found in the highest BVAP 4-2-1 plan district, and any BVAP that complied with Section 5 would not be a retrogression.

3. Other Evidence of the Predominance of a Racial Motivation.

Not only did the racial motivation predominate *ab initio* from the Parish's adoption of the DOJ's improper retrogression standard; both courts below clearly erred in ignoring the record evidence that race also predominated in the actual post-1990 Census reshaping of District 3.

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[9] *Cedric Floyd v. Parish of Jefferson*, Civil Action No. 86-0265, United States District Court for the Eastern District of Louisiana (1987).

First, both courts clearly erred in looking at the motivations for all of the districts' designs rather than just the motivation for gerrymandering District 3. The incumbents who would run from Districts 5 and 6, under the current plan, got to keep districts basically identical to those under the earlier 1990 plans. Councilman Hooper of District 4 (Kenner), under the 1990 plans, had already reluctantly agreed to sacrifice to District 3 the favorable black precincts he enjoyed under the 4-2-1 plan; in 1991 he only had to accept some additional "bleaching" of his district. Councilman Ward of District 1 was politically satisfied because the changes for 1991 still left him running only from areas from which he had won re-election several times before. Since these four council members' districts were not substantially affected, they did not take an active interest in the shape of District 3 as long as the plan was declared legal and in effect in time for the fall 1991 elections. This is evidenced by the support all four of these incumbents had shown for the earlier plans, by their tacit support for the similar Special Master's (post-1990 Census) Plan.

The only motivations that counted were those that shaped District 3 (and thus the adjoining District 2). Councilman Lawson, with a majority always with him, dictated the shapes of Districts 2 and 3 in all of the Council majority's plans of 1989, 1990, and 1991.[10] He actually acted against his own political self-interest in shaping the current Districts 2 and 3, by seeking a minimum 55% BVAP in District over and above even the DOJ's unreasonable benchmark.[11]

It could only be clear error for the district court to accept Lawson's *Bush v. Vera*-educated 1997 testimony over

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[10] Please see Petition for Writ of Certiorari, footnote 34, p. 21.

[11] Please see Petition for Writ of Certiorari, footnotes 36, 37, 38, 39, all on p. 22.

contrary admissions also made by him in the 1997 trial and his actual actions in 1989-91. Everyone on the Council knew, at all times pertinent hereto, that Lawson and Giardina would wind up running against each other in the fall of 1991. The *EJC* case record clearly shows that all parties (including Lawson) believed in 1989-90 that the new Census would require only minor "ministerial" changes to the Districts 2 and 3 that they then adapted. So, in all three of those pre-1990 Census plans, Lawson drew District 2 to suit his political needs at Giardina's expense. In drawing District 2 to his political advantage in 1989-90, Lawson always put the heavily white majority part of Avondale in District 3, and put Grand Isle, all of the Lafitte area, and the whole of Woodmere in his District 2. The District 2 he then produced also included some black-majority precincts that would reliably vote for him, a Democrat, against Giardina, a Republican. It is also worth noting again that all of these earlier previous plans respected the Parish's traditional districting principles of north/south boundaries between the West Bank districts.

It was only after Lawson made the post-1990 Census determination to "meet or beat" the minimum 55% BVAP demanded by the *EJC* plaintiffs for District 3 (admittedly in order to get them to accept his plan as a settlement, and further due to Lawson's misguided belief that a 55% BVAP was required to avoid a Section 5 preclearance denial) that he then acted to take the overwhelmingly white portion of Avondale out of District 3 (to lower District 3's white VAP)[12] and to place it into his current District 2. Further, at trial he admitted – with regret – that to increase District 3's BVAP,

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[12] The *Theriot* trial court erroneously held (A50-51) that this portion of Avondale, taken out of District 3 and placed into District 2 by Lawson, was overwhelmingly black, when the record clearly shows the opposite was true; removing that part of Avondale raised, not lowered, District 3's BVAP.

he was forced to move portions of black population into the new District 3 that he dearly wanted to keep within his District 2 to assist him in the coming race against Republican Giardina. These changes were politically detrimental to him – he narrowly won in 1991, he lost to Giardina in a 1995 re-match. The bizarre "V" shape of District 3 was adopted admittedly and specifically to gerrymander its enhanced BVAP, and required abandoning the Parish's traditional districting principles,[13] with its bizarre shape at the very least providing circumstantial evidence of race predominance in its configuration. *Miller v. Johnson*, 515 U.S. 900, at 912-913 (1995).

Try as the opposition might, this appeal is not a credibility question but an evidentiary one. The trial court's clear errors are evident – by its misapplication of this Court's relevant case holdings, by its opining as to occurrences that were exactly the opposite from those shown by the record, to its admonishing the plaintiffs not to present certain evidence as irrelevant and then basing a judgment upon the lack of such evidence, and yes, by its credibility choices also. Where the trial court does accept some of the overwhelming evidence and testimony proving the plaintiffs' case – such as Lawson's intentionally adopting the non-compact enhanced black majority district – the court simply misapplies the standards in place to determine race-predominance.

Conclusion

Unless certiorari is granted herein and the decisions below are overturned, congressional, state and local redistricting required by the new 2000 Census may likely cause many new racial gerrymanders. The DOJ will be encouraged to insist upon unreasonable retrogression benchmarks as a condition of preclearance, and subject

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[13] Please see Petition for Writ of Certiorari, footnote 50, p. 26.

jurisdictions will be forced into racial gerrymanders to avoid the cost of litigating Section 5 objectives.

It will then fall upon independent citizens like the lower-middle-income petitioners here, to use limited resources to attempt to right these wrongs, thereby burdening federal district courts. Their and the courts' tasks in the process will be made more difficult because the bodies doing the redistricting, educated by *Bush v. Vera*, will cloak their racial motivation in the language of "politics" in order either to discourage or defeat lawsuits.

The current districting represents an ongoing Equal Protection violation. Because the current districts otherwise would remain in effect until 2004, new elections should be ordered held as soon as possible from non-racially-biased districts. A remand to the Fifth Circuit for a decision on any of the issues would only result in justice delayed for the *Theriot* petitioners, and will deny the proper guidance from this Court needed by the many jurisdictions which will be redistricted next year regarding proper Section 5 benchmarks as well as evidentiary questions involved with Equal Protection claims in the context of election districting. Petitioners respectfully urge that this Court grant certiorari, and that there be a judgment in favor of the plaintiffs, ordering that the Parish of Jefferson's councilmanic districts be redistricted by following traditional districting principles, without allowing racial considerations to predominate.

Respectfully submitted this 8th day of May, 2000.

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